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No. 644

In The
Supreme Court of the United States
OCTOBER TERM, 1966

EXLEY EXPRESS, INC., *Appellant,*

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, et al, *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

JURISDICTIONAL STATEMENT

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THE ARGUS PRESS, SEATTLE, WASHINGTON

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In The
Supreme Court of the United States
OCTOBER TERM, 1966

EXLEY EXPRESS, INC., *Appellant*,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, et al, *Appellees*.

No. ——

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

JURISDICTIONAL STATEMENT

Appellant appeals from a judgment of the United States District Court for the District of Oregon, entered June 27, 1966, dismissing a complaint which sought to annul and set aside an order of the Interstate Commerce Commission which, in appellant's view, granted Albany Food Products, Inc. far broader "grandfather" motor common carrier authority than that to which Albany's operations entitle it. This statement is submitted to show that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial question is presented.

OPINIONS BELOW

The opinion and judgment of the District Court of Oregon (unreported) is set forth in Appendix A hereof. The order (unreported) of the Interstate Commerce Commission dated May 6, 1965, referred to in Appendix A hereof, is set forth in Appendix B hereof. A corrective order issued September 9, 1965, is set forth in Appendix C hereof. Other relevant reports and orders of the Commission, all under the title of *Albany Food Products, Inc., Common Carrier "Grandfather" Application,* ICC Docket No. MC 118045, are attached to the complaint as follows:

Exhibit A — Report and Order recommended by Joint Board No. 5, served May 13, 1960;

Exhibit B — Order of the Interstate Commerce Commission, Division 1, of September 27, 1960;

Exhibit C — Report and Order recommended by Joint Board No. 5, served April 28, 1961;

Exhibit D — Report of Division 1 of the Commission served January 4, 1962; 1962;

Exhibit E — Order of Division 1 acting as the Appellate Division of the Interstate Commerce Commission served June 18,

Exhibit F — Order of Division 1 of the Interstate Commerce Commission acting as the Appellate Division served January 5, 1965.

JURISDICTION

Appellant seeks review of a judgment rendered by a three-judge District Court in an action brought by appellant seeking to annul and set aside orders of the Interstate Commerce Commission. The lower court judgment sustained the order of the Commission which granted Albany Food Products, Inc. far broader "grandfather" authority than it was entitled to under the Transportation Act of 1958.

The action in the lower court was brought pursuant to the provisions of Sec. 17(9) and 205(h) of the Interstate Commerce Act, as amended (Title 49 USCA, Sec. 14(9) and 305 (h)) pursuant to title 28 USCA, Sec. 1336, 1398, 2284 and 2321 through 2325, inclusive. In accordance with the provisions of Sec. 2284, a three-judge District Court was convened to hear the case. The opinion and judgment of the District Court was dated and entered on June 27, 1966. Notice of appeal was filed in District Court on August 11, 1966. The jurisdiction of the Supreme Court to review the judgment below by direct appeal was conferred by 28 USC Sec. 1253 and Sec. 2101(b). The following decisions sustain the jurisdiction of this court to review on direct appeal the judgment in this case: *Interstate Commerce Commission v. Hoboken Manufacturers R. Co.*, 320 U.S. 368 (1943); *American Trucking Ass'n., Inc. v. U.S.*, 364 U.S. 1 (1960); *Interstate Commerce Commission v. New York, N.H. & H.R. Co.*, 372 U.S. 744 (1963).

QUESTIONS PRESENTED

1. Whether the Commission's order granting Albany Food Products, Inc. such broad and extensive "grandfather" authority is based upon adequate findings and supported by substantial evidence.

(We believe the evidence shows that Albany Food Products' operations of sufficient substantiality to warrant issue of a "grandfather" certificate were confined to service between the points covered by the order served January 4, 1962, and that the certificate initially issued by the Commission embodies and embraces all the authority that is warranted on the record.)

2. Whether there is a substantial parity between Albany Food Products' bona fide operations on and prior to May 1, 1958, as compared to the operations authorized by the certificate the Commission issued.

STATEMENT OF THE CASE

On December 5, 1958, Albany Food Products, Inc. filed an application pursuant to the "grandfather" provisions of Sec. 7(c) of the Transportation Act of 1958 (49 USC, Sec. 303(b)(6)), as amended by Sec. 7 of Public Law 85-625). By its application Albany sought a certificate authorizing operations in interstate or foreign commerce, as a common carrier by motor vehicle, over irregular routes, of frozen fruits, frozen berries, and frozen vegetables between points in California, Wash-

ington and Oregon.

The initial hearing on the application was held at Portland, Oregon February 1, 1960, before Joint Board No. 5, composed of representatives of the States of Washington and Oregon. A number of rail and motor carriers, including the appellant, opposed the application.

Testimony advanced at the hearing showed that from 1947 until February 13, 1959, the applicant was engaged in the packing and processing of frozen fruits, frozen berries, and frozen vegetables. As of May 1, 1958, the applicant owned one truck and semi-trailer used primarily for hauling merchandise from the applicant's plant to its consignees.

The applicant presented evidence of only 39 shipments it had transported on or prior to May 1, 1958. One was a regulated item not entitled to consideration, 28 were shipments of frozen vegetables that originated in Albany, Oregon, one was a combined shipment of frozen vegetables and frozen berries that originated at Albany. Only one shipment, from Chehalis, Wash. to Redwood City and Millbrae, Calif. moved from any points in Washington to any point in California. Only three of the 39 shipments originated at points in California; there were single shipments from Santa Clara, Calif. to Eugene, Oreg. No shipment moved from California to Washington. The applicant presented evidence of only one shipment of frozen fruit that moved on or prior to the statutory

date. This was transported exactly on the statutory date of May 1, 1958, and moved from Watsonville, Calif. to Eugene, Oreg. The evidence does not reflect any other shipments from Watsonville, Calif. to Eugene, Oreg. during the 18-month period. In fact, the only other shipment shown from Watsonville, Calif. to any destination was a shipment of apples from Watsonville, Calif. to Corvallis, Oreg.

On the basis of the showing made by the applicant, the Joint Board found applicant entitled to authority to operate as a common carrier by motor vehicle, over irregular routes, of frozen vegetables (1) from Albany, Oreg. to Seattle and Burlington, Wash., ports of entry on the international boundary between the United States and Canada at or near Blaine and Sumas, Wash. and points in San Francisco, Alameda, and Los Angeles Counties, Calif. and (2) from Seattle to Corvallis, Oreg.

In June, 1960, the applicant filed exceptions and petitioned for further hearing. The applicant's petition was granted and further hearing was held in Portland, Oreg. December 14, 1960. Another exhibit was introduced. Applicant's new evidence showed many additional shipments but failed to reveal any shipments of frozen vegetables both before and after the critical date between any combination of points not covered by the initial order.

As to frozen berries, the Board found applicant entitled to authority from Albany, Oreg. to points in San

Francisco, Alameda, and Los Angeles Counties, California on the basis of movements both before and subsequent to the statutory date.

The only movements of fruit which the applicant showed it had transported both before and after the "grandfather" date were shipments of apples from Watsonville, Calif. to Corvallis, Oreg., one of which was made in 1957, two in 1958 prior to May 1, and three in 1958 after May 1 and one in 1959. The Board found that the shipments in question do not reflect sufficient continuity of operation to justify the grant of the "grandfather" authority of frozen fruits.

Again the applicant filed exceptions and the protestants replied. On January 4, 1962, the Commission issued the order which is set forth in Exhibit D of the complaint.

In February, 1962, the applicant petitioned for reconsideration. The protestants replied. The petition was denied by the order set forth in Exhibit E of the complaint.

On June 12, 1964, the applicant filed a second petition for reconsideration, to which the protestants replied. Then, on May 6, 1965, the Commission reconsidered and issued an order (Appendix B) in which the Commission found that "applicant was, on May 1, 1958, in bona fide operation, in interstate or foreign commerce, as a common carrier by motor vehicle, over irregular routes, of frozen fruits, frozen berries, and frozen vegetables, (1) from

points in Oregon west of U. S. Highway 97 to points in California and those in Washington west of U. S. Highway 97, (2) from points in Washington to points in California and those in Oregon west of U. S. Highway 97, and (3) from points in California to points in Oregon and Washington west of U. S. Highway 97."

On August 4, 1965, the Commission issued a certificate authorizing the service described above.

Whereupon, the appellant filed the instant suit in the United States District Court of Oregon in which it requested the court to review and set aside the Commission's order of May 6, 1965. The court's order of June 27, 1966, is attached hereto as Appendix A. This appeal follows.

Appellant contends: (1) That on the basis of the evidence Albany Food Products' operations of sufficient substantiality to warrant issuance of a "grandfather" certificate were confined to service between the points covered by the order served January 4, 1962 (Exhibit D to the complaint), and the certificate initially issued by the Commission embodies and embraces all the authority the Commission is warranted in awarding the applicant.

(2) The Commission's order in this case violates the "substantial parity" rule that has prevailed in determining "grandfather" applications since *Alton R. R. Co. v. United States,* 315 U.S. 15, 62 S. Ct. 432, and was followed in

United States v. Carolina Freight Carriers Corp., 315 U.S. 475, 480.

(3) The operations of Albany Food Products, Inc. prior to May 1, 1958, were extremely limited and essentially confined to those operations authorized by the certificate initially issued by the Commission. The order which the Commission issued on reconsideration authorized far more extensive operations than the applicant is entitled to under the "grandfather" clause of the Transportation Act of 1958. It clearly exceeds the mandate of the act.

(4) Appellant is entitled to have the "grandfather" authority that is issued to Albany Food Products so limited as to permit that company to engage in only those operations in which it had been engaged on and since May 1, 1958.

(5) The Commission exceeded its authority in granting Albany Food Products far broader "grandfather" authority than that to which its operations entitle. Such action has had the effect of denying appellant equal protection of the laws.

QUESTIONS ARE SUBSTANTIAL

From the foregoing statements, the conclusion would seem to be inescapable that the questions presented are so substantial as to require this court's plenary consideration, with briefs on the merits and oral argument, for resolution.

Sec. 7(c) of the Transportation Act of 1958 clearly contemplates that "grandfather" applicants will not be granted greater authority than that which will enable them to continue to perform substantially the same operations in which they were engaged in May 1, 1958. To permit greater operations is to exceed the mandate of the Congress and to defeat the purpose of regulation. Albany Food Products was not engaged in bona fide operations in the transportation of frozen fruits, frozen berries and frozen vegetables from points in California to points in Oregon and Washington; it was not engaged in such transportation from points in Washington to points in California; its operations from Oregon to California were essentially limited to traffic originating at Albany, Oreg.

It is obvious that the order complained of far exceeds the Commission's authority, and is not supported by substantial evidence.

CONCLUSION

For the reasons stated above, appellant requests that probable jurisdiction of this appeal be noted; or, in the alternative, that the judgment of the court below be reversed and the case remanded to the Commission for reconsideration.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

EXLEY EXPRESS, INC., *Plaintiff*, vs. UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants*, And ALBANY FOOD PRODUCTS, INC., *Intervening Defendants.*	Civil No. 65-427 **ORDER AND JUDGMENT**

It appearing to the Court that the order of the Commission dated May 6, 1965, is supported by substantial evidence and is not arbitrary or capricious,

NOW, THEREFORE, the order of the Commission is hereby affirmed and this action dismissed.

Dated this 27th day of June, 1966.

BEN. C. DUNIWAY
Circuit Judge

GUS J. SOLOMON
District Judge

JOHN F. KILKENNY
District Judge

APPENDIX B

NO. MC-118045

ALBANY FOOD PRODUCTS, INC., COMMON CARRIER "GRANDFATHER" APPLICATION

Decided May 6, 1965

On reconsideration, findings in prior report modified. Applicant found entitled to continue operations as a common carrier by motor vehicle of frozen fruits, frozen berries, and frozen vegetables from and to specified points and territories in named States by reason of having been engaged in such operations on and continuously since May 1, 1958. Issuance of a certificate approved upon compliance by applicant with certain conditions, and application in all other respects denied.

Earl V. White for applicant.

James T. Johnson, Robert B. Batchelder, Randall B. Kester, John G. McLaughlin, John M. Hickson, and *Howard E. Roos* for protestants.

REPORT OF THE COMMISSION ON RECONSIDERATION

DIVISION 1, ACTING AS AN APPELLATE DIVISION, COMMISSIONERS MURPHY, TUCKER, AND BROWN

MURPHY, *Commissioner:*

By application filed December 5, 1958, under the "grandfather" provision of section 7(c) of the Transportation Act of 1958, Albany Food Products, Inc., of Albany, Oreg., seeks a certificate of public convenience and ne-

cessity authorizing the continuance of operations, in interstate or foreign commerce, as a common carrier by motor vehicle, over irregular routes, of frozen fruits, frozen berries, and frozen vegetables, between points in California, Washington, and Oregon. The application is opposed by class I rail carriers in the western district, member lines of the Pacific Southwest Railroad Association, Exley Express, Inc., Los Angeles-Seattle Motor Express, Inc., Pacific Intermountain Express Co., Home Transfer and Storage Co., and Refrigerated Truck Lines.

In the prior report, decided December 26, 1961 (not printed), division 1 granted applicant authority to transport (1) frozen vegetables (*a*) from Albany, Oreg., to Arlington, Seattle, and Burlington, Wash., ports of entry on the international boundary between the United States and Canada at or near Blaine and Sumas, Wash., and points in San Francisco, Alameda, and Los Angeles Counties, Calif., (*b*) from Watsonville, Calif., to Corvallis, Oreg., (*c*) from Mount Vernon, Wash. to Los Angeles, Calif., and (d) from Seattle, Wash., to Corvallis, Oreg., (2) frozen berries (*a*) from Albany, Oreg., to Seattle, Wash., and points in San Francisco, Alameda, and Los Angeles Counties, Calif., (*b*) from Tacoma, Wash., to Albany, Oreg., and (*c*) from Kent, Wash., to Los Angeles, Calif., and (3) frozen fruits (*a*) from

Watsonville, Calif., to Corvallis, Oreg., and (*b*) from Tacoma, Wash., to Watsonville, Calif. Applicant's petition for reconsideration was denied by division 1, acting as an appellate division, on June 11, 1962, and a certificate of public convenience and necessity embracing the operating rights granted by division 1 was issued on August 28, 1962. Subsequently, on June 15, 1964, applicant filed a petition requesting leave to file a tendered further petition for reconsideration. This request was granted by appellate division 1's order of December 23, 1964. Replies to the petition were filed by rail carriers on January 25, 1965, and by Los Angeles-Seattle Motor Express and Exley Express, Inc., separately, on February 1, 1965. We have determined to reopen the proceeding for reconsideration herein in light of the apparent inconsistency of certain findings and conclusions of the prior report with the Commission's recent review of the 1958 "grandfather" standards in *Willis Shaw Frozen Exp., Inc., Com. Car. Application,* ___ M.C.C. ___, decided February 2, 1965, on remand from the United States Supreme Court in *Willis Shaw Frozen Exp., Inc., v. United States,* 377 U. S. 159.

In its petition applicant asserts (1) that the restrictive operating rights granted in the prior report have resulted in a substantial curtailment of its operations to the extent

that only increased transportation of exempt commodities has enabled it to stay in business, (2) that the atomized grant of authority is not commensurate with the scope of service provided by applicant on the critical date and will not allow for a practical motor carrier operation, (3) that the three involved commodities should be considered as a single class, (4) that territorial authority should be granted to allow adequate flexibility of operation by applicant, and (5) that the instant application should be reconsidered in light of the Supreme Court's decision in *Willis Shaw, supra,* and other recent court cases involving the 1958 "grandfather" act. Applicant requests that authority be granted from points in California to points in Oregon and Washington west of the Cascade Range, from points in Oregon to points in California and those in Washington west of the Cascade Range (including ports of entry on the international boundary line), and from points in Washington to points in Oregon and California. In reply protestants collectively contend (1) that because applicant has been limited to the rights granted in its certificate No. MC-118045 for over 2 years, it cannot meet the statutory requirement of continuous operation since the critical date, (2) that the court's decision in *Winter Garden Co. v. United States,* 211 F. Supp. 280, cited by applicant, does not support the conclusion that

frozen fruits, berries, and vegetables must be treated as a single commodity class (see *Frozen Food Exp., v. United States,* 219 F. Supp. 131), (3) that applicant's claim of adverse effect because of a limited grant is not a relevant consideration, and (4) that, in summary, applicant is not entitled to more authority than it has already received.

The facts have been fully and accurately set forth in the prior report and will not be repeated in detail here. The evidence may be briefly summarized as follows: From 1947 to February 16, 1959, applicant's principal business was the packing and processing of frozen fruits, berries, and vegetables. During the same period it also utilized one tractor-trailer unit for the transportation of the involved commodities. Since February 1959 it has discontinued its processing operations, having leased its plant and equipment to another company, but it continues to perform motor carrier operations. At the time of the further hearing herein it had increased its equipment to two units. The prior report found, and we affirm that finding here, that applicant's operations on and since the critical date have been those of a for-hire carrier as contemplated by the "grandfather" act. Shipments transported by applicant upon which it relies for the "grandfather" authority sought herein are listed in organized form in the appendixes to the prior report. 98 M.C.C.

DISCUSSION AND CONCLUSIONS

In the *Willis Shaw* case, *supra*, the Commission found, as particularly pertinent to the instant proceedings,[1] that although there is no requirement as a matter of law that frozen fruits, berries, and vegetables be treated as a single commodity class, such a finding may be made if the facts in a particular situation warrant it, and (2) that an applicant's operations should not be frozen into a precisely delineated, point-for-point operation where it is shown that applicant has held itself out and provided service to representative points throughout a particular area or territory. We believe that in view of the above findings, applicant is entitled to "grandfather" rights somewhat more extensive than those authorized in the prior report.

Protestants argue that because since August 1962, applicant has been authorized to operate only within the scope of its certificate, it cannot establish continuous operations up to the present time. We find no merit in this contention. Applicant established continuous operation up to the time of hearing. The effect of our findings is to apply the proper standards to the evidence adduced

[1]The Commission also found, *inter alia*, that a cutoff date generally applicable to all "grandfather" proceedings should not be applied in resolving the question of remoteness of shipments, but that finding is of no real significance here, since only one shipment was shown to have been moved by applicant in 1956 and authority was granted to cover that operation.

at that hearing. Applicant has not slept on its rights and is entitled to a presumption that its operations would have continued as before the issuance of its present certificate which is too narrowly drawn. Moreover, considering the circumstances, the break in operations is not significant.

It is clear that applicant's operations in Oregon[2] and Washington (except outbound) have been limited almost entirely to points west of U. S. Highway 97[3] and that California operations have involved widespread points throughout the State. Shipments of all three of the involved commodities have moved between scattered points throughout this territory, although there have been comparatively few shipments of frozen fruit. Viewing applicant's "grandfather" operations as a whole, we are persuaded that the evidence supports the conclusion that applicant has handled the three commodities as a single class, and they will be so regarded herein.

Shipments from Oregon have moved to three points in western Washington (all before and after the critical date) and numerous points in California. From 11 Wash-

[2]Two shipments from Weston, Oreg., prior to the critical date appear to be unrelated to applicant's overall operation from and to northwestern points in that State.

[3]Applicant suggests the Cascade Range as a dividing line, but that description appears to be indefinite and administratively undesirable.

ington origin points, 4 western Oregon points have been served, 2 both before and 4 after May 1, 1958, and 4 California points have received shipments, 2 both prior and subsequent to the critical date. Territorial authority appears warranted in the circumstances.

Looking at northbound operations from California points, shipments from 10 origin points moved to 5 points in western Oregon. Four of the destination points were served before the critical date and 3 thereafter, but only Corvallis received shipments both before and after the date. The prior report granted authority only for the transportation of frozen fruits and vegetables from Watsonville to Corvallis. The standards announced in the *Willis Shaw* case, *supra*, require a more liberal grant of authority. It is apparent that despite applicant's failure to provide service *both* before and after the critical date as to individual points other than Corvallis, it served numerous representative points throughout the involved territories both prior and subsequent to May 1, 1958. The same situation prevails with respect to operation from California to western Washington points, where six widespread origins and three destination points (all before and after the critical date) were served. Authority from California to points in Oregon and Washington west of U. S. Highway 97 will be granted.

ALBANY FOOD PRODUCTS, INC., "GRANDFATHER" APPLICATION

FINDINGS

On reconsideration, we find that applicant was, on May 1, 1958, in bona fide operation, in interstate or foreign commerce, as a common carrier by motor vehicle, over irregular routes, of frozen fruits, frozen berries, and frozen vegetables, (1) from points in Oregon west of U. S. Highway 97 to points in California and those in Washington west of U. S. Highway 97, (2) from points in Washington to points in California and those in Oregon west of U. S. Highway 97, and (3) from points in California to points in Oregon and Washington west of U. S. Highway 97 and has not operated since that time; that an amended certificate authorizing the continuance of such operations should be granted; and that in all other respects the application should be denied.

Upon compliance by applicant with the requirements of sections 215, 217, and 221(c) of the Interstate Commerce Act and with our rules and regulations thereunder within the time specified in the order entered concurrently herein, an appropriate amended certificate will be issued. An appropriate order will be entered.

COMMISSIONER BROWN concurs in the result.

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, Acting as an Appellate Division, held at its office in Washington, D. C., on the 6th day of May A. D. 1965.

No. MC-118045

ALBANY FOOD PRODUCTS, INC., COMMON CARRIER "GRANDFATHER" APPLICATION

It appearing, That on December 26, 1961, the Commission, division 1, made and filed its report and order in the above-entitled proceeding, granting the application in part;

It further appearing, That applicant's petition for reconsideration, filed February 21, 1962, was denied by order of division 1, acting as an appellate division, on June 11, 1962;

It further appearing, That on August 28, 1962, applicant was issued Certificate No. MC-118045, embracing the operating rights granted in the above-described report of December 26, 1961;

It further appearing, That applicant's request for leave to file a further petition for reconsideration of the above-described order, filed June 15, 1964, was granted by division 1, acting as an appellate division, on December 23, 1964;

It further appearing, That replies to the above described petition for reconsideration were filed by pro-

testant rail carriers, jointly on January 25, 1965, and by protestants Los Angeles-Seattle Motor Express and Exley Express, Inc., separately, on February 1, 1965;

Wherefore, upon consideration of the record in the above-entitled proceedings, and of the above-described petition and replies; and good cause appearing therefor:

It is ordered, That the orders dated December 26, 1961, and June 11, 1962, be, and they are hereby, vacated and set aside, and that the above-entitled proceedings be, and it is hereby, reopened for reconsideration on the present record;

And it further appearing, That full investigation of the matters and things involved in the above-entitled proceeding has been made, and the Commission, division 1, acting as an appellate division, on the date hereof, has made and filed a report on reconsideration herein, containing its findings of fact and conclusions thereon, which report, and the report of December 26, 1961, are hereby referred to and made a part hereof:

It is ordered, That the above-entitled application, except to the extent granted herein, be, and it is hereby, denied, effective June 21, 1965.

And it is further ordered, That unless compliance is made by applicant with the requirements of sections 215, 217, and 221(c) of the Interstate Commerce Act within 90 days after the date of service hereof, or within such

additional time as may be authorized by the Commission, the grant of authority made in said report on reconsideration shall be considered as null and void and the application shall stand denied its entirety effective upon the expiration of the said compliance time.

By the Commission, Division 1, Acting as an Appellate Division.

BERTHA F. ARMES,
Acting Secretary.

(SEAL)

APPENDIX C

ORDER

SERVICE DATE
SEPTEMBER 14, 1965

At a Session of the Interstate Commerce Commission, Division 1, Acting as an Appellate Division, held at its office in Washington, D.C., on the 9th day of September, 1965.

NO. MC-118045

ALBANY FOOD PRODUCTS, INC., COMMON CARRIER "GRANDFATHER" APPLICATION

It appearing, That the report in this proceeding, reported at 98 M.C.C. 618, contains the following on Sheet 622 at lines 19-28: "On reconsideration, we find that applicant was, on May 1, 1958, in bona fide operation, in interstate or foreign commerce, as a common carrier by motor vehicle, over irregular routes, of frozen fruits, frozen berries, and frozen vegetables, (1) from points in Oregon west of U. S. Highway 97 to points in California and those in Washington west of U. S. Highway 97, (2) from points in Washington to points in California and those in Oregon west of U. S. Highway 97, and (3) from points in California to points in Oregon and Washington west of U. S. Highway 97, and has not operated since that time";

It further appearing, That the word "not" appearing at the end of line 27 was obviously a typographical error;

It is ordered, That the said report be, and it is hereby, modified by striking the clause quoted in the first appearing paragraph hereof and substituting the following in lieu thereof: "On reconsideration, we find that applicant was, on May 1, 1958, in bona fide operation, in interstate or foreign commerce, as a common carrier by motor vehicle, over irregular routes, of frozen fruits, frozen berries, frozen vegetables, (1) from points in Oregon west of U. S. Highway 97 to points in California and those in Washington west of U. S. Highway 97, (2) from points in Washington to points in California and those in Oregon west of U. S. Highway 97, and (3) from points in California to points in Oregon and Washington west of U. S. Highway 97, and has so operated since that time";

It is further ordered, That such correction should be reflected in the bound volumes of the Commission's motor carrier reports.

By the Commission, Division 1, Acting as an Appellate Division.

H. NEIL GARSON
Secretary

(SEAL)

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In the Supreme Court
of the United States

No. 644

OCTOBER TERM, 1966

EXLEY EXPRESS, INC.,

Appellant,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, et al.,

Appellees.

On Appeal from the United States District Court for the District of Oregon

MOTION TO AFFIRM

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In the Supreme Court
of the United States

No. 644

OCTOBER TERM, 1966

EXLEY EXPRESS, INC.,

Appellant,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, et al.,

Appellees.

On Appeal from the United States District Court for the District of Oregon

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Revised Rules of this Court, appellee Albany Food Products, Inc., moves that the judgment of the District Court be affirmed.

STATEMENT

In its Statement of the Case appellant places major emphasis upon the shipments shown in an exhibit presented at the earlier Commission hearing, held February

1, 1960. (J.S. at 5-6.) This may be misleading inasmuch as appellant barely mentions the supplementary exhibit listing twice as many shipments, which was presented at the second Commission hearing, held December 14, 1960.

In addition, appellant insists upon matching shipments transported before the critical date with those transported thereafter, identical both as to exact commodity and points of origin and destination. This was rendered obsolete by the decision of this Court in *Willis Shaw Frozen Exp., Inc.* v. *United States,* 377 U.S. 159 (1964) and detracts from the true import of appellee's "grandfather" operations as reflected in its shipment exhibits. These shipments were analyzed by the Commission in the appendices to the reports and orders attached to the complaint as Exhibits C and D.

Enumerated in such appendices are 97 shipments transported in 1957 and in 1958 prior to May 1. One hundred eighty-five shipments were transported thereafter, to and including the month of January 1960. Another classification of the origin and destination points set forth in the Commission's analysis is attached to this motion to affirm as Appendix A and Appendix B. This classification does not segregate frozen vegetables, frozen berries, and frozen fruits since the three commodities were obviously transported as a single class. This was the conclusion of the Commission in the report and order under attack.

ARGUMENT

This appeal presents no question warranting plenary consideration by this Court. The Commission's order attacked herein was issued pursuant to criteria set forth in *Willis Shaw Frozen Exp., Inc.* v. *United States, supra,* and the issues raised by appellant here were there presented and decided.

The Commission's reports and orders which preceded the report and order under attack herein were made prior to the *Shaw* decision. In those earlier reports the Commission considered frozen vegetables, frozen berries, and frozen fruits as three separate commodities as a matter of law. The Commission then authorized the continuance of "grandfather" operations only to the extent that a shipment occurring after the critical date was a repetition of a shipment occurring before that date of the same commodity between the same origin and destination points. Only in such instances, according to the Commission's interpretation of section 7(c) of the Transportation Act of 1958 (49 U.S.C. § 303(b)(6), as amended by § 7 of Pub. L. 85-625) was the "statutory prerequisite of continuity of operation" established (Exhibit A to Complaint at 4).

By treating frozen vegetables, berries, and fruits separately and confining its consideration only to those shipments prior to the critical date which were repeated thereafter, areawide "grandfather" authority was rarely granted by the Commission, since at least the smaller carrier was unable to show repetitive shipments

to a sufficient number of points in a given territory to be representative of the whole (Exhibit D to Complaint at 6).

The Commission's "tabulator" approach to the granting of "grandfather" authority under the Transportation Act of 1958 was sustained in the following district court decisions, all in orders unaccompanied by written opinions: *Battaglia* v. *United States,* Civil Action No. 61-321, D. Ore., March 29, 1962; *Consolidated Freightways, Inc.* v. *United States,* Civil Action No. 40438, N.D. Calif., May 3, 1962; *Olmstead* v. *United States,* Civil Action No. 5480, W.D. Wash., May 17, 1962; *Northwest Fisheries Transp., Inc.* v. *United States,* Civil Action No 5418, W.D. Wash., May 17, 1962; *Home Transfer & Storage Co.* v. *United States,* Civil Action No. 62-297, D. Ore., October 22, 1962; *Willis Shaw Frozen Exp., Inc.* v. *United States,* Civil Action No. 1655, W.D. Ark., February 11, 1963, reversed 377 U.S. 159.

Thereafter following, in close succession, were four district court decisions resulting in remands to the Commission for the correction of errors. These remands were obviously due to the Commission's basically incorrect conception of its responsibility, the end result of which was "grandfather" grants so narrowly drawn as to bear no reasonable relationship to the purpose of the "grandfather" clause—to grant to those coming under regulation authority to continue existing operations. The remanding district court decisions are as follows: *Winter Garden Company* v. *United States,* 211 F. Supp.

280 (E.D. Tenn. Oct. 22, 1962); *Jarman* v. *United States,* 219 F. Supp. 108 (D. Md. June 18, 1963); *Frozen Food Express* v. *United States,* 219 F. Supp. 131 (N.D. Tex. July 8, 1963); and *Hale Distributing Company* v. *United States,* 221 F. Supp. 266 (S.D. Cal. July 10, 1963).

The litigation finally culminated May 4, 1964, in the decision of this Court in *Willis Shaw Frozen Exp., Inc.* v. *United States, supra.* The Commission's order (89 M.C.C. 377) which had been sustained by the district court, *supra,* granted Shaw the right to haul frozen vegetables, berries, and fruits from named origins to named destinations and then, considering frozen vegetables, berries, and fruits separately, from other named origins to other named destinations, thus completely "atomizing" Shaw's "grandfather" rights. The district court was reversed in a per curiam decision in which this Court stated as follows:

> "We think *United States* v. *Carolina Freight Carriers Corp.,* 315 U.S. 475, 62 S. Ct. 722, 86 L. Ed. 971, requires reversal of the judgment and a remand to the Commission for reconsideration in light of appellant's status and performance as a common carrier, the transportation characteristics and marketing pattern of these seasonal agricultural products, and the demonstrated ability of appellant to perform the services." (*Willis Shaw Frozen Exp., Inc.* v. *United States, supra,* 377 U.S. at 159-160.)

The Commission thereafter interpreted the mandate of this Court to allow a finding that frozen vegetables,

berries, and fruits had been handled by a carrier as a single commodity class. The Commission concluded, in its reconsideration of *Shaw* (99 M.C.C. 141), as follows:

> "It is manifest that our function in administering the 1958 'grandfather' Act is not to freeze an applicant's operations into a precisely delineated, point-for-point operation exactly corresponding to points where shipments have previously moved if, in fact, that applicant has held itself out and provided service to representative points throughout a particular area or territory."

In the order under attack herein the Commission found that the frozen vegetables, berries, and fruits transported by appellee had been transported as a single commodity class. In view of appellee's holding out to transport the three commodities indiscriminately throughout the entire area of its operations and the fact that appellee's transportation service during the entire period covered by its shipping exhibits was rendered with but one tractor-trailer unit, it is obvious that the three frozen commodities were transported as a single commodity class.

"The transportation characteristics and the marketing pattern of these seasonal agricultural products" (*Willis Shaw Frozen Exp., Inc.* v. *United States, supra,* at 160), which renders unrealistic a grant of point-to-point authority is clearly indicated by the large number of origin and destination points involved in appellee's 282 representative shipments. The fact that a number of appellee's shipments of a particular commodity handled before the critical date were not repeated thereafter

between the same origin point and the same destination point, hardly warranted the Commission's "pre-Shaw" conclusion that the statutory prerequisite of continuity of operation was not established. To the contrary, the absence of repeat shipments and the new origin and destination points served after but not before the critical date verifies the contention that the origin and destination points of this particular traffic change from year to year in the normal course of business, being attributable to the special characteristics of the commodities.

Appellant complains that the Commission's order violates the "substantial parity" rule that has prevailed in determining "grandfather" applications since *Alton R. R. Co.* v. *United States,* 315 U.S. 15 (1942) (J.S. at 8).

The *Alton* case furnishes no support whatever for appellant's position that the "substantial parity" rule has here been violated. That case affirmed the Commission's grant of a "grandfather" certificate authorizing the transportation of automotive vehicles to all points in certain states even though the proof showed that deliveries had only been made to several points in some of the states. As to whether the Commission had power to authorize operations in an entire state where only a few points in that state had been served, the Court stated as follows (the quotation also appears in *Jarman* v. *United States, supra,* at 115 and, partially, in *Winter Garden Company* v. *United States, supra,* at 285):

> ". . . while the test of "bona fide operation' within a specified 'territory' includes 'actual rather than potential or simulated services' (*McDonald* v.

> *Thompson,* 305 U.S. 263, 266), it does not necessarily restrict future operations to the precise points or areas already served. The characteristics of the transportation service rendered may of necessity have made trips to any specified locality irregular or sporadic. And they may likewise have restricted prior operations to but a few points in a wide area which the carrier held itself out as being willing and able to serve . . ." (*Alton R. R. Co.* v. *United States, supra,* 315 U.S. at 21.)

Appellant contends that appellee's "grandfather" authority should be limited to the results of the tabulation of before and after shipments of a particular commodity which moved between the same origin and destination points This contention was rejected in *Alton R. R. Co.* v. *United States, supra,* and *United States* v. *Carolina Freight Carrier's Corp.,* 315 U.S. 475 (1942), cases arising under the Motor Carrier Act of 1935 (49 U.S.C. § 306) and in *Willis Shaw Frozen Exp., Inc.* v. *United States, supra,* with respect to the Transportation Act of 1958. As this Court stated in the *Carolina* case (partially reproduced in *Frozen Food Express* v. *United States, supra,* at 139):

> ". . . For this Act should be liberally construed to preserve the position which those like appellee have struggled to obtain in our national transportation system. *To freeze them into the precise pattern of their prior activities, as was done here, not only may alter materially the basic characteristics of their service, it also may well be tantamount to a denial of their statutory rights."* (*United States* v. *Carolina Freight Carriers Corp., supra,* 315 U.S. at 488.) (Emphasis added.)

CONCLUSION

The order of the Commission delineating the scope of appellee's "grandfather" authority was based on the proper legal standards, and was supported by adequate findings, which in turn were supported by substantial evidence. This appeal presents no substantial question warranting review by this Court and the judgment of the District Court should be affirmed.

Respectfully submitted,

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APPENDIX A

Origins of Shipments of Frozen
Vegetables, Berries, and Fruits
Transported by Albany Food Products, Inc.

1957 to and including January 1960

Oregon	*California*	*Washington*
***Albany	**Anaheim	**Arlington
*Corvallis	**El Centro	**Burlington
**Dayton	*Fullerton	*Centralia
*Portland	*Los Angeles	*Chehalis
**Stayton	**Modesto	***Kent
*Weston	**Oakland	***Mt. Vernon
*Woodburn	*Oxnard	***Seattle
	**Pasadena	*Spokane
	**Sacramento	**Sumner
	*San Jose	***Tacoma
	**Sanger	**Wenatchee
	*Santa Clara	
	***Watsonville	

* Shipments before but not after May 1, 1958.
** Shipments after but not before May 1, 1958.
*** Shipments both before and after May 1, 1958.

APPENDIX B

Destinations of Shipments of Frozen Vegetables, Berries, and Fruits Transported by Albany Food Products, Inc.

1957 to and including January 1960

Oregon	*California*	*Washington*	*British Columbia*
***Albany	***Alameda	***Arlington	***Chilliwack
***Corvallis	**Culver City	***Burlington	**Haney
***Eugene	**Anaheim	***Seattle	*New Westminster
***Salem	***Glendale	***Tacoma	**Sardis
***Portland	***Hayward		**Vancouver
	***Los Angeles		
	*Milbrae		
	*Modesto		
	***Oakland		
	**Pasadena		
	*Patterson		
	*Redwood City		
	*San Diego		
	**Sacramento		
	***San Francisco		
	**Santa Barbara		
	**Ventura		
	***Watsonville		

* Shipments before but not after May 1, 1958.
** Shipments after but not before May 1, 1958.
*** Shipments both before and after May 1, 1958.

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 644

EXLEY EXPRESS, INC., APPELLANT

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the final judgment of a three-judge district court (J.S. App. A) dismissing appellant's suit to set aside an order (J.S. App. B; p. 10) of the Interstate Commerce Commission. The basic issue is the validity of the Commission's partial grant of the application of Albany Food Products, Inc., an appellee, for motor-carrier "grandfather"

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authority under Section 7(c) of the Transportation Act of 1958 (72 Stat. 573) to transport frozen fruits, frozen berries, and frozen vegetables.[1]

On December 5, 1958, Albany Food Products, Inc., filed an application for "grandfather" authority to transport frozen fruits, berries, and vegetables between points in Oregon, Washington, and California. After full administrative proceedings, the Commission found that Albany Food Products, Inc. had established *bona fide* "grandfather" operations from, to, and between certain points, and authorized issuance of a certificate substantially more limited than that sought (J.S. App. B, p. 2). A petition for further consideration of the limited grant of authority was denied by the Commission on June 11, 1962.

On June 15, 1964, Albany Food Products asked the Commission for leave to file a petition for reconsideration. The stated ground was that, under the Court's decision in *Willis Shaw Frozen Express, Inc.* v. *United States,* 377 U.S. 159, the petitioner was entitled to broader authority. The Commission granted the petition and in its subsequent Report on Reconsideration concluded that, applying the standards established by *Shaw,* Albany Food Products was in fact entitled to broader authority than was previously granted (J.S. B, p. 6).

On appeal, the district court found that "the order of the Commission dated May 6, 1965, is supported by

[1] In *Frank P. Battaglia, et al.* v. *United States, et al.,* appeal pending, No. 564, O.T., 1966, a similar issue is presented, except that there, the motor carrier's application was partially denied.

substantial evidence and is not arbitrary or capricious" and "is hereby affirmed and this action dismissed" (J.S. App. A).

ARGUMENT

This appeal presents no substantial question warranting plenary consideration by this Court. The legal standards of the "grandfather" clause of Section 7(c) were fully considered and determined by this Court in *Willis Shaw Frozen Express, Inc.* v. *United States*, *supra*. Like the *Battaglia* case (*supra*, fn. 1), in which the opposite result was reached on different facts, this appeal involves only the application of those standards to particular circumstances.[2]

The authority granted Albany Food Products by the Commission achieved substantial parity with its prior *bona fide* operations, and was properly sustained by the court below. Albany Food Products had conducted operations both prior to the "grandfather" date (May 1, 1958) and during the critical period in transporting frozen fruits, berries, and vegetables from, to, and between a substantial number of points in the territory covered by the Commission's grant. For example, it had served four Western Oregon points from eleven points in Washington; five Western Oregon points from ten points in California; three points in Western Washington from points in

[2] The *Shaw* decision and the Commission's actions thereunder are discussed in the motion to affirm filed by the United States and the Interstate Commerce Commission in *Battaglia* v. *United States*, No. 564, *supra*, at pages 4–5.

Oregon; and numerous points in California from points in Western Oregon (J.S. App. B, p. 7 and 8). "While the test of 'bona fide operation' within a specified 'territory' includes 'actual rather than potential or simulated service' (*McDonald* v. *Thompson*, 305 U.S. 263, 266), it does not necessarily restrict future operations to the precise points or areas already served" (*Alton R. Co.* v. *United States*, 315 U.S. 15, 21). The Commission's factual conclusion that Albany Food Products "handled the three commodities as a single class" and that its operations justified a broad, area-wide authority is supported by substantial evidence.

The precise scope of an individual carrier's "grandfather" rights, under Section 7(c)—a subject of continuing litigation,[8] always turns on the particular facts of the case. Here the correct standard was applied to the particular circumstances of this record. There is no occasion for further review.

---

[8] Subsequent to this Court's decision in *Shaw*, six Section 7(c) cases have been filed in the district courts. In two such cases the Commission decision has been sustained (*Colonial Refrigerated Transportation, Inc.* v. *United States*, 255 F. Supp. 999 (N.D. Ala.), notice of appeal filed, and *Battaglia* v. *United States*, *supra*, n. 1); in one case the Commission decision was reversed (*Willis Shaw Frozen Express, Inc.* v. *United States*, 256 F. Supp. 257 (W.D. Ark.)); and three cases are still pending: *Lester C. Newton Trucking Co.* v. *United States*, Civil Action No. 2508, D. Del.; *Winter Garden Co.* v. *United States*, Civil Action No. 5457, E.D. Tenn.; and *W. W. Hughes* v. *United States*, Civil Action No. 41335, E.D. Pa.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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No. 644

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EXLEY EXPRESS, INC., *Appellant,*

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *et al,* *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

BRIEF OPPOSING MOTION TO AFFIRM

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

BRIEF OPPOSING MOTION TO AFFIRM

Pursuant to Rule 16 (3) of the Rules of this Court, the appellant files this brief opposing the Motions to Affirm heretofore filed by the appellees.

All appellees, United States of America, Interstate Commerce Commission and applicant appellee, Albany Food Products, Inc., would put the Commission's decision in this case under the tent of *Willis Shaw Frozen Express, Inc. v. U. S.*, 377 U.S. 159, A per curiam opinion which reads in its entirety as follows (377 U.S. at 159-160):

> "Appellant applied to the Interstate Commerce Commission under the 'grandfather' clause of the Transportation Act of 1958, Sec. 7 (c), 72 Stat. 573, 49 U.S.C. Sec. 303 (b) (6), to transport as a common carrier over irregular routes frozen fruits, berries, and vegetables and frozen seafoods and poultry when transported with such frozen fruits, and vegetables. The Commission granted a certificate which substantially curtailed appellant's prior operations. 89 MCC 377. The District Court affirmed without opinion.
>
> "We think *United States v. Carolina Freight Carriers Corp.*, 315 U.S. 475, requires reversal of the judgment and a remand to the Commission for reconsideration in light of appellant's status and performance as a common carrier, the transportation characteristics and marketing pattern of these seasonal agricultural products, and the demonstrated ability of appellant to perform the services."

That decision in no way dictates the absurd result that has been achieved herein in that on the basis of the showing of extremely insubstantial, sporadic and inconsequential service Albany Food Products has been granted broad authority to serve virtually all points on the Pacific Coast, a far broader grant than this appellant received on the basis of a showing of several thousand shipments.

The appellant is willing to concede for the sake of argument that fruits, berries and vegetables be considered as a single class commodity but the appellant does insist and remind the court that the questions raised by this appeal direct themselves to a con-

sideration of the question of whether the Interstate Commerce Commission order dated May 6, 1965, is supported by substantial evidence and the question whether the Interstate Commerce Commission failed to apply the proper governing principles in deciding the question of the territory or points within that territory authorized to be served by the appellee applicant as a motor common carrier. Perhaps the most vivid example of lack of substantial evidence and obvious failure to properly apply the legal test can be pointed to by reference to the fact that the appellee applicant is authorized by the Commission order to serve all points in California to all points in the State of Washington west of U. S. Highway 97 while the evidence in the record before the Commission reflected only three shipments from California to Washington prior to the "grandfather" date. All of these originated in Los Angeles. After the "grandfather" date no origin point was served south of Watsonville. Thus, on shipments from California to Washington, the only origin point served before the "grandfather" date was not served thereafter nor were any in the same general area (a radius of 300 miles).

The record before the Interstate Commerce Commission in the instant case is void of any evidence shedding "light of appellant's status and performance as a common carrier, the transportation characteristics and marketing pattern of these seasonal agri-

cultural products, and the demonstrated ability of appellant to perform the services" as those terms are used and applied in the Shaw case.

Even more appropriate than the *Shaw* decision is that of the *Carolina* case referred to and relied upon in *Shaw*. It is to be noted that in *Carolina* the court approved the Commission's point-to-point grant of authority to the applicant as opposed to the area or territory-wide authority sought. As pointed out by Justice Douglas in the *Carolina* decision, the bona fide operations standard to measure the area or the specification of localities which may be serviced carry the connotation of substantiality. The case also makes clear that the holding out to serve a specified area is not alone sufficient. Citing *McDonald v. Thompson*, 305 U.S. 263, 266, the *Carolina* court emphasized the fact that it is actual rather than potential or simulated service which is required. The record herein considered by the Commission as well as the District Court did not concern itself with transportation characteristics and a marketing pattern of the products involved to begin to warrant the broad authority granted by the Commission and approved by the District Court or for that matter anything more than point-to-point service.

We submit that the Congressional mandate to the Commission as contained in Sec. 7 (e) of the Trans-

portation Act of 1958 cannot be interpreted as anything but a direction to the Commission to determine the extent to which a given applicant has been engaged in operations which were formerly exempt and which are now subject to regulation and to issue that applicant a certificate or permit commensurate with those operations in which the applicant was engaged prior to the "grandfather" date and in which it has continued to engage since that date.

As the Supreme Court held in *Alton R. Co. v. U.S.*, 315 U.S. 15, 62 S.Ct. 432, 'Grandfather' acts contemplate substantial parity between future operations and prior operations. See *Motor Convoy*, 2 MCC 197, 200; *Eastern Carriers v. U.S.*, 31 F. Sup. 232.

Appellant is ready to admit that it may be possible in a given case for there to be a pattern of points grouped in an area possessing some cohesion in an economic or transportation sense which would warrant an award of transportation authority to a particular area or territory and also that such areas could well coincide with governmental units. However, if the applicant's transportation operations do not indicate that such a pattern exists, the substantial parity as called for in the *Alton* case does not permit the transformation of an essentially point-to-point operation into a territorial or area grant of authority even under the *Shaw* decision. A consideration of the evidence

introduced by the appellant at the level of the administrative hearing before the Interstate Commerce Commission dictates the conclusion that the broad grant of authority to the appellee applicant is not supported by the substantial evidence required.

While it is true as argued by the United States of America and the Interstate Commerce Commission in their motion to affirm herein that the test of "bona fide operation" does not necessarily restrict future operations to the precise points or areas already served, the case law authority cited by all parties dictates that there must be some evidence of the existence of a reasonably defined area or territory. Such evidence was not introduced in this case.

Appellant submits that there is no substantial evidence to support the Commission's conclusion that the applicant had established a right to the broad area-wide authority granted.

Contrary to the appellee's contention, neither the *Shaw* decision nor any other District Court decisions cited rejected what appellee chooses to call the Commission's "tabulator" approach in disposing of "grandfather" rights applications. On the contrary, every decision under the 1958 act that we have seen other than the instant Albany case has used the so-called "tabulator" approach. Obviously, the instant

decision could not withstand such critical analysis. To establish and prove the wisdom of the necessity to consider the evidence of point-to-point experience in these matters is the present case.

Inasmuch as on movements from Oregon to California the only origin served both before and after the "grandfather" date was Albany and the only other origins served prior to the "grandfather" date but not since were Portland and Woodburn, there is no justification in the record for granting applicant authority from all points in western Oregon to all points in California. Similarly, where the only Oregon origins served on shipments to Washington other than two shipments out of Corvallis prior to the "grandfather" date were shipments from Albany, the applicant was clearly not entitled to authority from all points in Oregon west of U. S. Highway 97 to all points in Washington west of U. S. Highway 97.

We submit that not even the most liberal construction of the "grandfather" clause can justify the broad grant of authority to Albany Food Products under the facts of this case, and clearly the Commission Order dated May 6, 1965, is not supported by substantial evidence.

We do not contend that the Commission must restrict future operations to the precise points already served, but we do suggest there must be substantial

parity between prior and future operations. That substantial parity rule is clearly violated in this case.

CONCLUSION

For the reasons stated, appellants request that the court deny the motions to affirm and no probable jurisdiction of this appeal and probable jurisdiction of this appeal be noted; or, in the alternative that the District Court be summarily reversed and this case remanded to the Commission for reconsideration inasmuch as the Commission's error is plain and can be rectified by reconsideration by the Commission.

Respectfully submitted,

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